No. 84-175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE BROOKS SCHREIBER,

Petitioner,

v.

GENCORP, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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September 4, 1984

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Question Presented

Did the court of appeals hold correctly that the district court's approval of a settlement of eight related stockholders' derivative cases did not constitute an abuse of discretion?

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TABLE OF AUTHORITIES

Cases

Orders and Judgments Below

The orders and judgments of the district court, omitted in the petition, are not reported and are reproduced in the Appendix to this brief. The order of the district court approving the settlement is reproduced in Appendix A; the judgment approving the settlement is reproduced in Appendix B; and the order denying intervention is reproduced in Appendix C.

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Statement of the Case

Respondent disagrees with petitioner's statement of the case, insofar as is material to disposition of the petition, in the following particulars:

1. The Securities and Exchange Commission investigation of GenCorp, Inc. ("GenCorp") culminated in the simultaneous filing of a complaint, consent decree and judgment on May 10, 1976. *SEC* v. *The General Tire & Rubber Co.*, [1975-76] Fed. Sec. L. Rep. (CCH) ¶ 95,542 (D.D.C. 1976). The consent decree required GenCorp to establish a committee of "independent members of the Board" (Pet. C9) to conduct a full and complete investiga-

tion of the SEC allegations.[1] The findings of these independent directors, whose appointment to the committee was accepted by the SEC, were published in a 233 page report.

2. The GenCorp directors who voted to seek dismissal of these cases under the business judgment rule were determined by independent counsel to be unassociated with the charges made in the complaints.

3. The court of appeals in *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 237-238 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982), affirmed the FCC's denial of the renewal of one of RKO's broadcast licenses on the sole ground that RKO had not been "candid" with the FCC in license renewal proceedings. Petitioner makes no showing that any defendant in any of the settled cases had any association whatsoever with the disqualifying lack of candor. Hearings regarding the renewal of other RKO licenses are proceeding.

4. The district court in this case ordered full discovery on the alleged lack of independence of GenCorp's directors. Order of March 3, 1981 at 2. Based in part on that discovery, the district court concluded that there was no evidence that the directors were not independent (Resp. A10).

5. The district court considered numerous factors which confirmed the reasonableness of the settlement: (i) the merits of plaintiffs' claims (Resp. A6-10); (ii) the role played by the lawsuits in fashioning remedial measures within GenCorp (Resp. A14); (iii) the appointment of outside directors to the Board of RKO General, Inc. (Resp. A14); (iv) the complexity, length and expense of further litigation (Resp. A13); and (v) the small number of ob-

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[1] References such as "Pet. C9" are to the Appendix to petitioner's brief. References such as "Resp. A9" are to the Appendix to respondent's brief.

jectors (Resp. A15). Taking these and other factors into account, and acting as "a guardian of the corporation's interest" (Resp. A13), the district court found the settlement to be fair, reasonable and adequate.

Petitioner's thirty-nine page statement of the case, replete with inaccurate and inconsequential claims, is hardly a "*concise* statement of the case" (Sup. Ct. Rule 21.1(g); emphasis in original). *See Glick Bros. Lumber Co.* v. *Bowles,* 325 U.S. 877, *reh'g denied,* 326 U.S. 804 (1945); *Kennemer* v. *Billington,* 323 U.S. 709 (1944).

Summary of Argument

This case is patently unworthy of the Court's review. It involves merely a district court's approval of the settlement of derivative claims after reviewing and weighing numerous relevant considerations. The court of appeals determined only that the district court did not abuse its discretion in approving the settlement.

The decision below reached no holdings on matters of state law; it is not in conflict with the decision of any other court of appeals; there has been no departure from the accepted and usual course of judicial proceedings; and there has been no determination of an important question of federal law that should be settled by the Court. *See* Sup. Ct. Rule 17. The petition seeks nothing more than this Court's reevaluation and rebalance of the varied and numerous factors considered by the district court in approving the settlement as fair, reasonable and adequate.

ARGUMENT

The Decision Below—That the District Court Did Not Abuse Its Discretion in Approving the Settlement—Presents No Question for Consideration by This Court.

In evaluating the fairness of a proposed settlement, the district court is guided by several considerations, including "the complexity, expense and likely duration of the litigation . . . the reaction of the class to the settlement . . . the risks of establishing liability . . . [and] the risks of establishing damages." *Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); *accord Protective Committee* v. *Anderson*, 390 U.S. 414, *reh'g denied*, 391 U.S. 909 (1968); *Girsh* v. *Jepson*, 521 F.2d 153 (3rd Cir. 1975).

Approval of the settlement is a matter of the sound discretion of the district court, whose determination will be disturbed only if the court has "clearly abused his discretion." *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *Girsh* v. *Jepson*, 521 F.2d at 156; *United Founders Life Ins. Co.* v. *Consumers Nat. Life Ins. Co.*, 447 F.2d 647, 655 (7th Cir. 1971); *Young* v. *Katz*, 447 F.2d 431, 432 (5th Cir. 1971); *Detroit* v. *Grinnell Corp.*, 495 F.2d at 455:

> "[s]o much respect is accorded the opinion of the trial court in these matters that this Court will intervene . . . only when the objectors to that settlement have made a clear showing that the District Court has abused its discretion."

The court of appeals, following this authority, held only that the discretion afforded the district court had not been abused:

> "Upon consideration of the complex issues in this case, we conclude that the district judge's findings

and conclusions were not an abuse of discretion." (Pet. A21-22)

The decision below has neither the meaning nor the implications ascribed to it by petitioner in the first of his "questions presented." The decision neither "presumed" the good faith of respondent's directors nor defined the scope of the Ohio business judgment rule.

To the contrary, the court of appeals specifically stated that it " need not decide in this case" the reach of the Ohio business judgment rule (Pet. A13), and the district court noted that the question was "not properly before the court . . . ." (Resp. A6). As the question presented by petitioner was not decided below, it is not an appropriate subject for review. *Ellis* v. *Dixon*, 349 U.S. 458, 460, *reh'g denied*, 350 U.S. 855 (1955).

With regard to directors' good faith, the court of appeals ruled, after careful review of the "quite complex" facts of this case (Pet. A7), that "the district judge properly found insufficient evidence of the outside director's fraud or bad faith to warrant the conclusion of the lack of independence" (Pet. A16). Contrary to petitioner's assertion, the court of appeals merely restated the established principle that naming a director as defendant does not, without more, demonstrate the director's bad faith (Pet. A14). *Galef* v. *Alexander*, 615 F.2d 51, 60 n.17 (2nd Cir. 1980); *Lewis* v. *Anderson*, 615 F.2d 778, 781-783 (9th Cir. 1979), *cert. denied*, 449 U.S. 869 (1980); *Abbey* v. *Control Data Corp.*, 603 F.2d 724 (8th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980).

In any event, neither of these issues warrants the exercise of the Court's jurisdiction. The good faith of respondent's directors is a factual determination peculiar to the circumstances of this case and not an appropriate subject for the

Court's review. *See United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant . . . certiorari to review evidence and discuss specific facts."); *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498 (1951); *General Talking Pictures Corp* v. *Western Elect. Co.*, 304 U.S. 175 (1938). Furthermore, review of the lower courts' consistent factual determinations would be inconsistent with the "two court" rule. *See, e.g., Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) (the Court will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Moreover, the question of the scope of the Ohio business judgment rule, even if reached below, is also an inappropriate question for review on certiorari. *See Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944):

> "[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." [2]

Finally, the alleged inconsistency between the opinion below and that in *Hasan* v. *CleveTrust Realty Investors*,

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[2] No valid federal claims are brought here and, therefore, the rule of *Burks* v. *Lasker*, 441 U.S. 471 (1979), is not implicated. Plaintiffs failed to state a claim under § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), because there is no "transactional causation" between the activities giving rise to the complaints and the proxy process (Pet. A11). *See Gaines* v. *Haughton*, 645 F.2d 761, 773-776 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Genzer* v. *Cunningham*, 498 F. Supp. 682, 689-693 (E.D. Mich. 1980); *In re Tenneco Securities Litigation*, 449 F. Supp. 528, 531 (S.D. Tex. 1978); *Limmer* v. *General Tel. & Elect. Corp.*, [1977-78] Fed. Sec. L. Rep. (CCH) ¶ 96,111 (S.D.N.Y. 1977); *Lewis* v. *Elam*, [1977-78] Fed. Sec. L. Rep. (CCH) ¶ 96,013 (S.D.N.Y. 1977); *Levy* v. *Johnson*, [1976-77] Fed. Sec. L. Rep. (CCH) ¶ 95,899 (S.D.N.Y. 1977); *Gall* v. *Exxon*, 418 F. Supp. 508 (S.D.N.Y. 1976).

—— F.2d —— (6th Cir. 1984) (Pet. D1-15), is wholly illusory. *Hasan* involved the interpretation of Massachusetts, not Ohio, law, and the facts of the two cases are not comparable. Furthermore, *Hasan* and this case present stark procedural distinctions. The standard on review in *Hasan* was whether "genuine issues of material fact . . . preclude summary judgment as a matter of law" (Pet. D2), while review here was limited to determining whether the district court abused its discretion in approving the settlement (Pet. A2). The *Hasan* court reversed the decision below on the ground that the undisputed facts precluded summary judgment (Pet. D13-15).

The other hodgepodge of issues presented by petitioner is no more than a losing litigant's cavil about the clearly proper procedures employed below. Petitioner was afforded all of the rights which were his as an objector in settlement hearings. *See Cohen* v. *Young*, 127 F.2d 721, 724 (6th Cir. 1942), *cert. denied*, 321 U.S. 778 (1944); *Girsh* v. *Jepson*, 521 F.2d 153, 157-158 (3d Cir. 1975); 3B Moore's Federal Practice ¶ 23.1.24[2] (2d ed. 1982) at 23.1-137. Petitioner appeared before the district court, filed numerous briefs below, and was given "an unlimited opportunity to explain his client's objections" (Resp. C2; Pet. A6, A21).

Petitioner's questions regarding the adequacy of plaintiffs' counsel below (and his peculiar claim in the caption of his petition to represent "other similarly situated shareholders") has a hollow ring. As the district court noted, just weeks before appearing on behalf of petitioner in this case, counsel for petitioner represented two different parties before the Federal Communications Commission in an attempt to deny RKO renewal of its broadcast licenses (Resp. A16-17). Then, as now, it is unclear whose interest petitioner represents.

At bottom, petitioner simply disagrees with the judgment of respondent's management that these potentially disruptive derivative claims should be settled. As he did below, petitioner seeks judicial assistance in pursuing a path of retribution against GenCorp's management. In essence, petitioner would have this Court reconsider and reweigh all of the factors considered below in approving the settlement, including:

> "(1) the fashioning of remedial measures [by respondent], (2) the appointment of outside directors to RKO's board, (3) the difficulty of proving damages to and recovering damages for the corporation, (4) the complexity and expense of further litigation and (5) the relatively small number of objectors to the settlement." (Pet. A6).

The petition presents no occasion for the exercise of this Court's jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 4, 1984

APPENDIX

APPENDIX A

The December 15, 1981 Order of the District Court Approving the Settlement

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MDL No. 265

IN RE:

THE GENERAL TIRE AND
RUBBER SECURITIES LITIGATION

BATTISTI, C.J.

The controversy before this Court today consists of five shareholder derivative suits filed for the benefit of the General Tire and Rubber Company ("General Tire", "the Company").[1] In 1977 and in 1980, special committees appointed by the Company to oversee the litigation recommended that the continued prosecution of the suits would not be in the best interests of General Tire. Invoking the business judgment rule, the board of directors, minus certain individuals with demonstrated personal interest in the litigation, adopted the recommendations and dropped the suits. Thereafter, in 1981, the Plaintiffs in these actions arrived at a settlement proposal with the Company. Other

[1] *Kramer* v. *General Tire & Rubber Co.*, No. C77-395 (N.D. Ohio, filed Apr. 27, 1977); *Lewis* v. *O'Neil*, No. C77-374 (N.D. Ohio, filed Apr. 14, 1977); *Cohn* v. *O'Neil*, No. C77-396 (N.D. Ohio, filed April 27, 1977); *Milberg* v. *General Tire & Rubber Co.*, No. C77-397 (N.D. Ohio, filed Apr. 25, 1977); *Monheit* v. *O'Neil*, No. C81-1441 (N.D. Ohio, filed Jul. 17, 1981).

shareholders have appeared before the Court to attack both the legality of the directors' dismissals of the suits and the fairness to the Company of the settlement proposal itself. That proposal, which has been submitted to the Court for approval, is the subject of this order. The Court observes first, without deciding, that the directors very likely had power to dismiss the derivative suits under the business judgment rule. Secondly, as measured by the considerations expressed in federal law and policy, the Court finds the settlement proposal to be fair, reasonable, adequate, and in the best interests of General Tire. Accordingly, the complaints in these actions are dismissed on the merits and with prejudice.

I.

The present litigation arises out of corporate misfeasance of many years' standing. Throughout the 1960's and into the early years of the 1970's, General Tire engaged in an extraordinary scale of improper and apparently illegal activities, both within the United States and in other countries. The Company's wrongdoing attracted the attention of the Securities and Exchange Commission, and civil proceedings were eventually initiated. On May 10, 1976, the action was settled by the parties with the approval of the United States District Court in Washington, D.C. The Company was permanently enjoined from similar violations in the future, and General Tire agreed to establish a Special Review Committee ("SRC", "the Committee") to examine the suspect activities and submit a detailed report.

The resulting report was submitted to the chairman of the board of General Tire on July 1, 1977. Pursuant to its recommendations, a number of officers and employees paid the Company a total of $337,260 as reimbursement for

corporate funds which they had used for unlawful domestic political contributions. The Company also established procedures and guidelines to avoid any repetition of what had occurred.

In the aftermath of the SEC permanent injunction and consent decree, shareholders of General Tire filed four separate derivative suits—the four 1977—dated cases currently before this Court. The suits alleged injury to General Tire as a result of the unlawful or improper activities in which the Company had been engaged. The Judicial Panel on Multi-District Litigation consolidated the suits in the Northern District of Ohio under the present caption on April 18, 1977.

On July 1, 1977—the same day it submitted its report—the Special Review Committee notified the full board as to which members of the board it had concluded to be sufficiently independent of the actions discussed in the report to be capable of reviewing it and taking any implementing action necessary. On July 14, the six directors who had been approved by the Committee voted on behalf of the board to adopt and implement the Committee's recommendations. On October 24, the Bricker and Eckler law firm of Columbus, Ohio, advised the Committee that the latter was vested as a matter of business judgment with the authority to determine whether the Company should, or should not, pursue the derivative claims. Three days later, the Committee determined that further prosecution of the suits was not in the best interest of the Company. The independent directors thereupon instructed counsel to move for dismissal of the litigation.

The Company and various individual Defendants moved this Court for summary judgment, claiming that the independent directors had exercised their business judgment in a lawful manner. Further discovery was stayed pend-

ing decision on these motions. Plaintiffs' attorneys contested both the availability of the business judgment rule and the independence of the directors in question. In March, 1981, the Court ordered further discovery on independence, limiting such discovery to the use of depositions, documents, and interrogatories. Plaintiffs' attorneys issued numerous interrogatories and filed four depositions with the Court.

This Special Review Committee's report also led to the filing of a somewhat different lawsuit. RKO General, Inc., ("RKO") is a wholly-owned, unconsolidated subsidiary of General Tire. On January 24, 1980, the Federal Communications Commission denied RKO's application for renewal of the licenses to three of its television stations. The FCC's denial was explicitly based upon the record of improprieties and/or illegalities contained within the Committee's report, see Exhibit G, Affidavit of John J. Dalton, *Barr* v. *O'Neil,* No. 02040/80, N.Y. Supr. Ct., N.Y. Cty.

Thereafter, on February 14, 1980, a double derivative suit was filed in the Southern District of New York on behalf of General Tire and RKO. For the most part, the complaint was intended to redress the damages incurred by these firms as a result of the FCC's decision. Plaintiffs served various discovery requests upon Defendants, including requests for production of documents, interrogatories, and a detailed request for admissions of fact. On February 28, 1980, the board of General Tire appointed a Special Litigation Committee to investigate the suits. The Committee consisted of two new directors appointed to the Board in 1978. On March 27, 1980, again at the advice of the Bricker and Eckler law firm, this Committee recommended that the Company invoke the business judgment rule for the purpose of dismissing the new suit. On the same day, the seven directors now conceived to be inde-

pendent adopted the recommendation. Defendants filed motions to dismiss and also a motion for summary judgment pursuant to the business judgment rule. To these motions, Plaintiffs took vigorous exception. The case has subsequently been transferred to this district for purposes of the present settlement proceedings.

The additional discovery undertaken by the Plaintiffs of the four earlier suits evidently convinced them that further prosecution would be fruitless. On June 25, 1981 the parties presented for approval to this Court a Stipulation of Settlement. The Court entered an order directing that a hearing be held pursuant to Rule 23.1 of the Federal Rules of Civil Procedure in order to determine whether the proposed settlement was fair, reasonable, and adequate, and whether judgment should be entered dismissing these actions on the merits and with prejudice. The hearing was held on August 18, 1981.

Notice of the hearing was properly served upon the shareholders of General Tire. Shareholders John J. and Curtiss R. Pearl, Anne W. Rose, George Schreiber, J. A. Lockhart, and Howard L. Shuken filed objections to the proposed settlement, and John J. and Curtiss R. Pearl and George Schreiber appeared by counsel at the hearing to oppose the approval of the settlement. The Court received inquiries and suggestions from two other people who did not allege shareholder status.

Following the hearing, the Court directed the parties and objectors to submit proposed orders by means of which this litigation might be resolved. The parties provided an order supporting the settlement arrangements. The Pearls submitted an order, the gist of which is that the settlement as it presently stands is premature. George Schreiber produced another order rejecting the settlement as inadequate. The bulk of his order, however, as well as the additional

briefing he has submitted, consist of further arguments against the applicability of the business judgment rule in these proceedings, and against the independence of these directors should the rule be found applicable.

II.

The Court conceives essentially one issue in this litigation—namely, whether the proposed settlement is fair, reasonable, and adequate. Before addressing this question, however, the Court will devote some attention to the logically prior issue of whether the directors' dismissals of the shareholder suits were lawful. It must be emphasized at this point, however, that the Court's observations with respect to the legitimacy of the dismissals do not constitute determinations on the merits. Plaintiffs have already decided to settle with the Company, and the adequacy of Plaintiffs' representation of the shareholders in reaching this decision has been upheld in the prior order of this Court. Hence the business judgment rule, and the actual independence of the outside directors in this litigation, are not properly before the Court at this stage. Nonetheless, a fair consideration of the dismissal of the suits is appropriate, in view of the extended argumentation which Plaintiffs, Defendants, and Objectors have lavished upon this issue. The Court finds that Defendants had a strong likelihood for success on the merits of their motion for summary judgment.

Controversies involving the power of corporate directors—even, as here, where violations of federal law are alleged [2]—are ordinarily determined under applicable state

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[2] The 1977 suits allege, *inter alia*, violations of Sections 10(b), 12(b)(1), 13(a), and 14(a) of the Securities Exchange Act of 1934, as amended, 14 U.S.C. § 78a *et seq.*, and regulations thereunder.

law, *Burks* v. *Lasker*, 441 U.S. 471, 479 (1979). No claim has been made at this stage of the proceedings that any state law other than that of Ohio is applicable here.[3] The Ohio formulation of the business judgment doctrine is crystal clear. The board of directors of a corporation is vested with general authority to determine when actions shall be prosecuted or defended on behalf of the corporation, *Wadsworth* v. *Davis*, 13 Ohio St. 123 (1862); 11 Ohio Jur. 3d § 393. A given board may decide in good faith in the exercise of its discretion to refuse to bring suit against the corporation, and courts may not challenge this refusal unless it is "wrongful, fraudulent, and arbitrary," *Cooper* v. *Central Alloy Steel Corp.*, 43 Ohio App. 455, 183 N.E. 439 (1931); *Roderick* v. *Canton Hog Ranch Co.*, 46 Ohio App. 475, 480-81, 189 N.E. 669 (1933). More precisely, when the directors are in an unbiased position and act in good faith, the wisdom of their decision will not be reviewed by the courts, *Rice* v. *Wheeling Dollar Savings & Trust Co.*, 71 Ohio L. Abs. 205, 214, 130 N.E. 2d 442 (1954); see also W. Fletcher, Cyclopedia of the Law of Private Corporations § 5929.2 (rev. perm. ed. 1975). Contrary to the suggestion of Objector Schreiber, see Objection to Proposed Settlement at 6, the recent case of *Galef* v. *Alexander*, 615 F.2d 51 (2d Cir. 1980), casts no doubt upon the strength of the business judgment rule in Ohio. The Second Circuit expressly reiterated the general formulation that a good faith determination of a dis-

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[3] The *Monheit* plaintiffs had argued for the application of Delaware law, *see* Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss at 19. The Pearls do not renew that argument. Mr. Schreiber recognizes the applicability of Ohio law, *see* Objection to Proposed Settlement at 6-7. Defendants, of course, have argued the business judgment doctrine in terms of Ohio law throughout this litigation.

interested majority of the board to dismiss the derivative action ought not to be reviewed by the courts, *id.* at 57. More particularly, the *Galef* court concluded from its survey of Ohio law that non-defendant directors are apparently capable of dismissing such motions under the business judgment rule, *id.* at 64, n. 20. The directors who voted to dismiss the suits pending here are named Defendants in several instances.[4] However, the court cited with approval other federal cases for the proposition that merely nominal defendants, against whom no relief is asserted, or who did not benefit from the challenged transactions, should properly be considered disinterested, *id.* at 60, n. 17. As succeeding paragraphs will indicate, this Court finds little in the facts before it to suggest that reasonable claims for relief could be asserted against the outside directors in these cases. Nor is there any allegation that they have benefitted from the improprieties and/or illegalities catalogued in the Special Review Committee's report. Therefore, this Court would interpret *Galef* to support dismissal of these suits by the named Defendants on the facts given.

Objector Schreiber also argues that federal policy precludes summary dismissal via the business judgment rule of claims arising under section 14(a) of the 1934 Securities Exchange Act, Additional Brief of September 11, 1981 at 2, citing *Galef* v. *Alexander;* see also *Lewis* v. *Anderson,* 615 F.2d 778 (9th Cir. 1979). It is true that state law must give way to federal law when application of the former would be inconsistent with federal policy, *Burks* v. *Lasker,* 441 U.S. 471 at 479. It is also clear that the safeguarding of shareholders from false or misleading proxy information

[4] Mssrs. L. D. Henry, D. B. Mansfield, J.T. Morely, and W. B. Walsh are named Defendants in *Milberg, Cohn,* and *Monheit.* D. S. Henkel is named in *Milberg* and *Cohn.*

—the basis of section 14(a)—is a vital component of the federal securities laws. Nonetheless, this Court would not invalidate the dismissal and compromise of these suits on the purely formal basis that section 14(a) claims are present.

The facts of this litigation appear insufficient to support any reasonable allegation of responsibility on the part of the outside directors for the underlying misfeasances committed by the Company. Plaintiffs contend that the Company's proxy materials were false and/or misleading precisely because they accompanied and disguised these misfeasances, see e.g., *Cohn* Complaint at 22; *Milberg* Complaint at 6. This Court can find no better basis for attributing to the directors the deceptive proxy information than to the underlying conduct itself.

The cases cited by Mr. Schreiber are not binding in this circuit. Insofar as they establish a rigid restriction upon the directors' discretion based upon the formal presence of section 14(a) allegations, this Court would decline to follow them. The Court conceives in the facts before it no conflict between the business judgment doctrine and the federal policy of safeguarding the integrity of proxy materials.

Directors of a corporation are presumed to act in good faith, *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U.S. 455 (1903). The good faith of these directors has not been seriously challenged.[5] Objectors are therefore thrown back upon the argument that these individuals were

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[5] Objector Schreiber does indeed question the good faith of J. J. Dalton, Secretary and General Counsel of General Tire, Objection to Proposed Settlement at 12-15. The Court finds no need to indulge this inquiry with regard to Mr. Dalton. The Court sees no basis whatsoever for attributing Mr. Dalton's good faith, or lack of it, to the outside directors.

in some way disabled, by bias or personal consideration, from rendering disinterested judgment when they decided to dismiss the suits, *Rice* v. *Wheeling Dollar Savings & Trust Co.*, 71 Ohio L. Abs. 205.

Objector Schreiber attacks the independence of the outside directors who constituted the Special Review Committee and who voted to dismiss the *Kramer, Milberg, Cohn,* and *Lewis* suits in 1977, Objection to Proposed Settlement at 8-12; Response of George Brooks Schreiber to the Court's Requests at 2-4. He cites as justification the depositions of T. F. O'Neil, M.G. O'Neil, D. B. Mansfield, and C. C. Hoskins (a partner in the Bricker and Eckler law firm). The Court has examined these depositions for indications of suspicious relationships between these outside directors and the inside management of General Tire, and has found none.

Messrs. Henry and Morely appear to have known T. F. O'Neil, former chairman of the board of General Tire, for many years, and to have maintained some cursory social contact with him, Deposition of T. F. O'Neil at 17 and 19. Mr. Henkel provided legal assistance to the Company as outside counsel for securities-related matters for many years, Deposition of T. F. O'Neil at 810. These relationships in themselves would seem insufficient to establish bias in the outside directors, or control of them by inside management. On the contrary, there is little, if any, evidence to temper their appearance of being upright, responsible leaders in the business and civic communities. Plaintiffs themselves determined, after having taken these four depositions, that these individuals were in fact independent, Plaintiffs' Memorandum in Support of Proposed Settlement at 4-5. The Court sees no reason to question their conclusion.

It also deserves emphasis that four of the five outside directors who voted to dismiss in 1977 were appointed to the board in 1975—after the improper or illegal conduct alleged in the complaints filed in these actions, and in the complaint filed by the SEC.[6] They could not have been involved in that conduct.

Finally, Mr. Schreiber vigorously challenges the independence of Mr. Lester Garvin, who was appointed to the board in 1978, and who participated in the dismissal of the *Monheit* suit. He argues that Mr. Garvin was deeply involved in the improper practices engaged by the Company in Chile, which were catalogued in the Special Review Committee's report. Report at 121-161; Objection to Proposed Settlement at 12-14. In response, the Company asserts that Mr. Garvin was hired as an "independent consultant" for Chilean matters; that his identity as such was properly described in General Tire's proxy materials; and that his role in Chile in 1974-1975 consisted of investigating improprieties which had already taken place, Memorandum of the General Tire & Rubber Company in Support of Settlement at 8-9. The Company also points to the interview of Mr. Garvin by the Bricker and Eckler firm, which led the latter to conclude unequivocally that Mr. Garvin was not associated in any way with the events described in the Special Review Committee's report, *id.* at 9; Deposition of C.C. Hoskins at 31 and 39; Exhibit J, Affidavit of John J. Dalton, *Barr* v. *O'Neil,* No. 02040/80, N.Y. Supr. Ct., N.Y. Cty.

The evidence as it now stands would not be sufficient for this Court to conclude that Mr. Garvin was too biased or personally interested in the *Monheit* suit to recommend

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[6] L. D. Henry was appointned in 1973.

its dismissal. As discussed in previous pages, *Monheit* is primarily a claim for damages against General Tire, based upon the FCC's refusal to renew three licenses of RKO General. The FCC's refusal was founded explicitly upon the record compiled in the SRC report. That report was authored by outside directors whom the Court has already suggested to have been independent. It tracks General Tire's Chilean adventures in considerable detail for some forty pages, Report at 121-161. Nowhere does the name Garvin appear. Mr. Garvin was not a director or even an internal employee of General Tire when he was employed in Chile in 1974-1975. He was not named as a Defendant in *Monheit*. On this record, the likelihood that Mr. Garvin was unable to render a disinterested appraisal of the value of dismissing that suit simply does not appear reasonable.

In summary, it is not necessary at this point for the Court to determine whether the directors in question were independent. Nor does the Court do so here. The foregoing has been included herein to assure the Objectors who came forward with these concerns that the Court has given fair consideration to their arguments, and finds nothing to indicate that the settlement ought not to be approved. The Court now passes to the propriety of the settlement proposal currently submitted for approval.

III.

Federal Rule of Civil Procedure 23.1 leaves the approval of compromise settlements to the sound discretion of the court, *United Founders Life Ins. Co.* v. *Consumers National Life Ins. Co.*, 447 F.2d 647 (7th Cir. 1971); 3B Moore's Federal Practice § 23.1.24[2] (2d ed. 1981) at 132-133. The Rule places the Court in the position of a

third party to the compromise, and a guardian of the corporation's interest, *Masterson* v. *Pergament,* 203 F.2d 315 (6th Cir. 1953), *cert. denied,* 346 U.S. 832 (1953); *Norman* v. *McKee,* 290 F. Supp. 29 (N.D. Cal. 1968); *affirmed,* 431 F.2d 769 (9th Cir. 1970), *cert. denied sub nom. Security Pacific National Bank* v. *Myers,* 401 U.S. 912 (1971). Proponents of the settlement have the burden of persuading the court that their compromise is fair, reasonable, and adequate, *Cotton* v. *Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977).

In evaluating the reasonableness of such a proposal, courts are guided by several considerations. Perhaps most important is a comparison between the benefits achieved by the settlement as offered, the potential recovery which might follow a successful trial, and the risks to the corporation of recovering nothing, *Newman* v. *Stein,* 464 F.2d 689 (2d Cir. 1972), *cert. denied,* 409 U.S. 1039 (1972); *West Virginia* v. *Chas. Pfizer & Co.,* 314 F. Supp. 710 (S.D.N.Y. 1970), *affirmed,* 440 F.2d 1079 (2d Cir. 1971), *cert. denied sub nom. Cotler Drugs* v. *Chas. Pfizer & Co.,* 404 U.S. 871 (1971). Other significant factors include the complexity, length, and expense of further litigation, and the amount of opposition to the settlement, *Grunin* v. *International House of Pancakes,* 513 F.2d 114 (8th Cir. 1975), *cert. denied,* 423 U.S. 864 (1975); *Manual for Complex Litigation* at 56. The prevailing flavor of the cases reveals a preference for the voluntary resolution of litigation through settlement. Especially is this true with respect to shareholder litigation, which is notoriously difficult and uncertain, *Lewis* v. *Newman,* 59 F.R.D. 525 (S.D.N.Y. 1973).

The settlement proposed to this Court acknowledges the role which the derivative suits have played both in causing

the Company to make reparations pursuant to the consent decree in the SEC suit, and in establishing the ordered, legal guidelines and procedures which are now followed by the Company. It also mandates that for a period of at least three years two new outside directors will sit on the board of RKO General. In addition, the settlement calls for a ceiling of $500,000 in attorneys' fees for Plaintiffs' counsel, plus expenses. Plaintiffs' counsel has subsequently petitioned the court for the full $500,000 plus disbursements in the sum of $20,814.50.

It is the opinion of this Court, based upon the considerations just enunciated, that the proposed settlement is a reasonable one. This is not to suggest that the formula arrived at by the parties is ideal. The shortcomings of this arrangement are obvious and counsel for Mr. Schreiber and the Pearls have levelled appropriate assaults upon them, Transcript of Proceedings at 31-34 and at 76. No monetary recovery to the corporation is contemplated in this settlement. Although Plaintiffs are surely correct in maintaining that court approval is not dependent upon an exchange of funds, see Plaintiffs' Memorandum of Support at 27-34 and cases cited therein, this principle can hardly add luster to the deal. The corporate therapeutics upon which Plaintiffs lay such emphasis, *id.* at 12-15, were largely the result of the Company's own Special Review Committee, Report at 18-24.

Nevertheless, the proposed settlement has several advantages to recommend it. In the first place, although this Court has been careful to avoid a determination of the outside directors' independence, it is clear that Plaintiffs would have faced considerable difficulties had they brought this litigation to trial. In light of the record provided, the premonition of an adverse summary judgment in the thinking of

Plaintiff's counsel cannot be faulted. If little new is afforded by the settlement, the high risk of defeat on the merits is also avoided.

The settlement does provide some benefit to the Company not prefigured in the SRC's report. The addition of outside directors to the board of RKO General may well ensure more responsible behavior in this subsidiary. In any event, the Court will not second-guess the quality of concessions extracted by Plaintiffs from Defendants, *Glicken* v. *Bradford*, 35 F.R.D. 144 (S.D.N.Y. 1964). It may be that this particular concession represented the farthest limit of the possible for these Plaintiffs, in view of the bargaining limitations inherent in their legal positon.

The Court is also impressed with the number of objectors and the quality of their objections. At this point in the proceedings, only Mr. Schreiber and the Pearls have actively submitted proposed orders for the Court. The remaining objectors (as well, of course, as the original Plaintiffs) have melted out of the controversy. Although not definitive, this small number of objectors implies the acceptability of the settlement to the vast majority of shareholders, *Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

The gravamen of the Pearls' objection is that this settlement is premature. They argue that the Court's approval ought to be delayed pending the outcome of numerous other proceedings before the FCC and the Internal Revenue Service involving General Tire and RKO General. Only thus can a fair comparison be drawn between the terms of this settlement and the actual losses sustained by General Tire and its subsidiary, see Proposed Order; Transcript of Proceedings at 57 *et seq.*

The Court finds the utility of this argument absurd. Thirteen more broadcast licenses are potentially subject to revo-

cation by the FCC; if all thirteen are challenged and argued through full administrative and court proceedings, the results will not be known for many years. As a representative of the interests of the Company, this Court cannot permit such a sword of Damocles to be suspended above the directors and management of General Tire. To rule otherwise would establish a longterm, destructive impediment to the exercise of their business judgment in the day-to-day operations of the firm.

As for Mr. Schreiber, the Court expressed repeated concern at the hearing as to the ultimate purpose of his objection, Transcript of Proceedings at 49-51 and 111. Subsequent briefs and motions have not alleviated that concern. Mr. Schreiber's greatest emphasis has been placed upon the need for access to the working papers upon which the SRC based its report in 1977. These papers are under the control and custody of the Cleveland law firm of Baker and Hostetler. In the original SEC investigation, Judge George L. Hart, Jr., of the United States District Court for the District of Columbia ordered the papers sealed. Judge Hart was concerned with the need to protect American and foreign nationals whose lives might be jeopardized if the papers were released. He has since maintained the papers under seal.

Party counsel claim, however, that Mr. Schreiber's attorney, Steven R. Rivkin, Esq., has a mixed motive for seeking access to these materials. In its Memorandum in Support of Settlement, the Company claims that "until three weeks ago [Mr. Rivkin] was counsel of record before the FCC on behalf of a company [New South Media Corporation] seeking vigorously to have all of RKO's broadcast licenses revoked," at 12. Mr. Rivkin argued that the FCC's decision to revoke one license is grounds for the revocation

of the licenses of all thirteen RKO stations, and he "filed a request to the FCC to investigate RKO's tax dispute with the IRS as another possible ground for RKO's disqualification as a broadcast licensee," *id.* Additionally, General Tire notes that prior to representing New South Media, Mr. Rivkin was counsel for HUB Broadcasting when it challenged RKO's Boston television license. General Tire claims that rather than believing that access to the working papers is necessary to represent Mr. Schreiber and other shareholders here, "(a) more likely use of those files would be further muckracking of General Tire's past, such as that done in the past by Mr. Rivkin and his colleagues in the FCC proceeding," *id.* at 13, footnote. Similar allegations as to Mr. Rivkin's prior representation and motives were made at the hearing. Mr. Rivkin did not deny his prior involvement with HUB or New South Media.

This Court will not attempt to decide whether Mr. Rivkin is, in fact, currently engaged in conflict-burdened representation. However, a court must determine whether a shareholder in a derivative action fairly and adequately represents the interests of the company, see, e.g., *Davis* v. *Comed, Inc.*, 619 F.2d 588 (6th Cir. 1980) (where the court found that plaintiffs were acting as a front for others whose interests were inimical to the interests of the shareholders). For that reason, it is necessary for the Court to take notice of the motives of the shareholders' attorney here. It appears that there is good cause to believe that Mr. Schreiber is not able to fairly and adequately represent the interests of the Company. The Federal Rule is clear that in such circumstances the derivative suits ought not to be maintained, Fed. R. Civ. P. 23.1.

The foregoing discussion leads this Court to believe that the objections of the Pearls and of Mr. Schreiber are without

merit. Accordingly, the Stipulation of Settlement presented on June 25, 1981, is hereby approved.

The complaints in these actions are dismissed on the merits and with prejudice and without costs. The order entered today represents a full and final discharge against all persons whatsoever of any and all claims which were, or could have been, alleged in the complaints, by reason of, in connection with, or which arise out of the matters or transactions set forth or referred to.

In accordance with the Stipulation of Settlement, and for a period of three years from the date of consummation of the settlement, Defendant RKO General, Inc., will maintain as members of its board of directors at least two persons who are not officers or employees of that corporation.

Having considered applications by Plaintiffs for the allowance of counsel fees and disbursements, the Court authorizes counsel's fees in the amount of $500,000 and disbursements in the amount of $20,814.50. Said amounts will be paid by Defendant General Tire at the time and in the manner specified in the Stipulation of Settlement.

The Court retains jurisdiction to enter such further orders as may be necessary to carry out the Stipulation of Settlement.

IT IS SO ORDERED.

/S/ FRANK J. BATTISTI
Frank J. Battisti
Chief Judge

APPENDIX B

The December 15, 1981 Judgment of the District Court Approving the Settlement

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MDL No. 265

(C77-374, C77-395, C77-396, C77-397 & C81-1441)

IN RE:

THE GENERAL TIRE AND

RUBBER SECURITIES LITIGATION

BATTISTI, C.J.

In accordance with the Order filed on December 15, 1981,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Stipulation of Settlement presented to the Court on June 25, 1981, is approved.

/s/ FRANK J. BATTISTI
Frank J. Battisti
Chief Judge

APPENDIX C

The December 8, 1981 Order of the District Court Denying Intervention

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MDL No. 265

IN RE:

GENERAL TIRE &

RUBBER SECURITIES LITIGATION

BATTISTI, C.J.

On August 7, 1981, George Brooks Schreiber moved this Court "for leave to intervene as a plaintiff in these actions . . . on the grounds that he is . . . a shareholder in Defendant General Tire and Rubber Company and . . . that the settlement between the parties dated June 25, 1981 will, as a practical matter, impair and impede his ability to protect his interest as a shareholder and that his interest as a shareholder is not being adequately represented by plaintiffs herein." For the reasons stated below, Mr. Schreiber's motion to intervene is hereby denied.

Mr. Schreiber's status as an objector affords him the due process rights of a party to these settlement proceedings, *Cohen* v. *Young*, 127 F.2d 721, 724 (6th Cir. 1942), *cert. denied*, 321 U.S. 778 (1944); Haudek, *Settlement and Dismissal of Stockholders' Actions* (pt. 2), 23 Sw.L.J. 765, 803 (1969). As such, he is entitled to a "meaningful

participation" in the settlement hearing, including the right to argue and to develop a record, *Girsh* v. *Jepson,* 521 F.2d 153, 157-158 (3d Cir. 1975); 3B Moore's Federal Practice ¶ 23.1.24[2] (2d. ed. 1981) at 23.1-137. Mr. Schreiber can have no complaint in this regard with the latitude this Court has provided him. He appeared through his counsel, Steven R. Rivkin, Esq., to argue his objections at the August 18, 1981, hearing. Mr. Rivkin was given an unlimited opportunity to explain his client's objections at that time. Following the hearing, the Court requested that all parties and objectors attempt to negotiate new provisions. These negotiations were unsuccessful.[1]

The Court then requested that the objectors as well as the parties file proposed orders concerning the settlement as it stood. Mr. Schreiber filed a "response" in this Court on September 10, 1981, in which he produced further arguments to support his contention that the settlement is unacceptable. In addition, he was permitted to file additional briefs in opposition to the settlement on September 11, 1981. These and other materials submitted by the objector will be given careful consideration by the Court in its eventual determination with regard to the settlement. Should the settlement be approved, of course, Mr. Schreiber retains the right to appeal, *Cohen* v. *Young,* 127 F.2d 721 at 724.

Mr. Schreiber questions the adequacy of Plaintiffs' counsel in representing his interests as a shareholder. He claims that Plaintiffs' counsel have been lax in pursuing the issue of the independence of General Tire's outside directors, particularly Mr. Lester Garvin. The Court finds on the basis

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[1] On August 24, 1981, all Plaintiffs and Defendants filed a proposed order with the Court, in which they affirmed their failure to settle with the directors, and asserted that further attempts at negotiation appeared futile, Proposed Order at 5.

of the record before it, however, that the adequacy of Plaintiffs' counsel's representation cannot reasonably be faulted.

Of the five suits subject to settlement in this Court only *Monheit* v. *O'Neil,* No. C81-1441 (N.D. Ohio July 17, 1981), may potentially be affected by the question of Mr. Garvin's independence.[2] At the outset of that action, Plaintiffs' counsel served numerous discovery requests upon Defendants. The Company's Special Litigation Committee, which included Mr. Garvin, enlisted the services of the Bricker and Eckler law firm of Columbus, Ohio, to recommend to the Committee the actions to be taken with regard to this suit. The law firm examined earlier documents, conducted several additional interviews, including one with Mr. Garvin himself, and concluded that the members of the Committee were "absolutely and totally unassociated" with the improprieties and/or illegalities which underlay the suit, Exhibit J, Affidavit of John J. Dalton, *Barr* v. *O'Neil,* No. 02040/80, N.Y. Supr. Ct. N.Y. Cty, at 14-15. Defendants thereupon responded with motions to dismiss, and for summary judgment on the basis of the business judgment rule. To both of these, Plaintiffs' counsel took vigorous exception.

This Court subsequently ordered further discovery limited to the question of the independence of the outside directors who had dismissed the earlier suits in 1977.[3] Plaintiffs' counsel conducted four depositions, filed additional interrogatories, and concluded that they could not disprove the independence of these directors. They therefore entered into settlement negotiations with Defendants. Plaintiffs' counsel apparently determined at this point that the new

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[2] The other four were dismissed by outside directors in 1977, prior to Mr. Garvin's appointment to the board the following year.

[3] The Court's order was dated March 3, 1981; *Monheit* was not transferred into this district until July 8, 1981.

posture of the litigation would render further prosecution of the *Monheit* suit unprofitable as well. Accordingly, in the Stipulation of Settlement filed with this Court on June 25, 1981, the parties explicitly agreed to transfer *Monheit* to this district so that it could be settled with the other cases. The Court sees no reason to fault the judgment of Plaintiffs' counsel, based on this record. Certainly no colorable suggestion of impropriety has been raised. On these facts the Court is unwilling to question the adequacy of counsel's representation.

Finally, Mr. Schreiber offers a substantive challange to the independence of Mr. Garvin, and argues that further discovery is necessary to resolve the question. The Court does not believe it is necessary for Mr. Schreiber to intervene to raise these issues. It is enough that he has presented them by way of objection, and that he has produced evidence to support his arguments. The question of Mr. Garvin's independence and the need for further discovery are under consideration by the Court at this time, and will be analyzed as they relate to the decision whether the proposed settlement deserves to be approved.

The Court finds that the present posture of this litigation does not impair Mr. Schreiber's ability to protect his interest as a shareholder, and that Plaintiff's counsel has adequately represented that interest heretofore. The motion to intervene is therefore denied.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Frank J. Battisti
Chief Judge

APPENDIX D

Listing of Parent Companies, Subsidiaries (Except Wholly Owned Subsidiaries) and Affiliates Pursuant to Sup. Ct. Rule 28.1

RESPONDENT GENCORP, INC.:

Corporate Insurance and Reinsurance Company, Ltd.
Daily Gazette Company
Frontier Holdings, Inc.
Hopewell International Company, Ltd.
Metallurgical International, Inc.
Plasticos Laminados, S.A.
Productos Metalicos De Columbia S.A.
Tecnica de Aplicacion de Ingenieria, S.A. de C.V.